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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cox California Telecom, LLC (Uh-5684-C),

Complainant,

v.

Global NAPs California, Inc., (U-6449-C),

Defendant.

Case 06-04-026
(Filed April 28, 2006)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO DISMISS OR STAY PROCEEDING**

Summary

The motion of Global NAPs California, Inc. (Global) to dismiss or stay the proceeding is denied for failure to show good cause as required by Rule 87 of the Commission's Rules of Practice and Procedure.

Background

Global and Cox California Telecom, LLC (Cox) are both competitive local exchange carriers (CLECs) licensed by this Commission to provide local exchange service in California. On October 29, 2003, Global and Cox entered into a network interconnection agreement (the Interconnection Agreement) that set forth "the terms, conditions and pricing" under which the two companies would provide interconnection to each other within the state of California.

Pursuant to Section 5.7 of the Interconnection Agreement, two different billing arrangements were agreed upon, based on the nature of the traffic being interconnected. As a general rule, the Interconnection Agreement provides that the terminating carrier shall charge the originating carrier a fee based on minutes of use for terminating a call. The fees for such terminations are set out in an appendix to the Interconnection Agreement. However, the Interconnection Agreement contains an exception to the termination fee regime. For “Local Traffic” and “ISP-bound Traffic,” as those terms are used in the Interconnection Agreement, neither party pays the other for terminating calls originated by the other party, an arrangement generally known as “bill and keep.”

Section 1.25 of Interconnection Agreement defines “Local Traffic” as “traffic other than ISP-bound Traffic that is originated by a Customer of one Party on that Party’s network and terminates to a Customer of the other party on that other Party’s network.” The Interconnection Agreement contains further technical specifications to identify Local Traffic and separate it, for billing purposes, from traffic subject to the termination fee arrangement. The result of applying these specifications to the traffic between these carriers is that toll calls originating in one party’s local access and transport area (LATA) and terminating in the other party’s LATA are subject to termination fees.

Beginning in June 2004, Cox commenced monthly billing to Global for inter-LATA toll calls terminated by Cox on behalf of Global. On June 25, 2004, Cox received a letter from Robert J. Fox, Vice President – Industry Relations of Global, declining to pay the June, 2004 invoice. After first stating erroneously that “our companies do not have an interconnection agreement governing the terms and conditions of exchanging telecommunications services” Mr. Fox went on to refuse payment of the Cox invoice on the grounds that:

[T]he traffic you deliver and receive from my company, Global NAPs, Inc., or its affiliates and subsidiaries, is “information access traffic.” As such, the intercarrier compensation controlling the traffic is subject to federal law, specifically the provisions delineated in the ISP Remand Order. Simply put, the ISP Remand Order provides for bill-and-keep on the traffic we exchange since we were not exchanging traffic prior to the effective date of the Order in 2001. Accordingly the invoice and account are disputed in full.¹

Subsequent monthly bills from Cox to Global were responded to in similar fashion.

Following unsuccessful efforts to resolve the fee dispute informally pursuant to Section 28.8.4 of the Interconnection Agreement, on April 28, 2006 Cox brought this action for breach of the Interconnection Agreement. On June 9, 2006, Global filed the instant motion to dismiss or stay the action. On June 26, 2006, Cox filed its response.

Discussion

Global’s motion argues that:

- a. the Interconnection Agreement does not require Global to pay Cox for termination of IP-enabled inter-LATA toll traffic originated by Global;
- b. the FCC has expressly or impliedly pre-empted California’s intrastate access charge regime; and
- c. the Commission should refrain from hearing the case to avoid conflict with pending FCC proceedings.

¹ The ISP Remand Order referred to in the letter text is the *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-31 (released April 27, 2001).

If the Commission has jurisdiction to arbitrate this dispute, it appears to be a straightforward case of contract interpretation. The Interconnection Agreement provides that some traffic shall be exchanged on a bill-and-keep basis and other traffic shall be exchanged on a reciprocal compensation basis. The question for decision is into which category the traffic for which Cox billed Global falls. In the absence of federal pre-emption of state authority to resolve such disputes, this is precisely the sort of question that the FCC has empowered state commissions to resolve via arbitration proceedings.

But has the state been pre-empted? A review of the precedents cited by both Global and Cox is persuasive that although the FCC could, at some future time, decide to preempt state authority in this area, to this point in time it has not done so. As recently as two months, this issue was squarely before the United States Court of Appeals for the 1st Judicial Circuit, in a case involving Global with facts quite similar to those presented in this case. The 1st Circuit held “**that the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls...**”² [Emphasis supplied.] While a decision of a federal court in another judicial district is not binding on us, the federal court’s interpretation of federal law is entitled to substantial deference.³

² *Global NAPs, Inc. v. Verizon New England, Inc.*, 2006 U.S. App. LEXIS 8805 (April 11, 2006), p. 2.

³ While it is not usual for a litigant to cite precedent adverse to its litigation position, Global’s failure to cite the Verizon decision in its motion to dismiss is troubling. At the very least, it would have been appropriate to call our attention to the case, if only to dispute its reasoning and conclusions. The intentional omission of such a directly relevant precedent strongly suggests that Global hoped to keep this commission unaware of the case. While such litigation tactics do not rise to the level of a Rule 1 violation, they are not appreciated and should not be repeated.

That is especially so in this case, because the 1st Circuit panel asked the FCC to file an amicus brief on this very issue, namely, whether the FCC itself believed that it had expressly pre-empted the interstate access charge regime:

This court invited the FCC to file a brief as amicus curiae on the preemptive effect of the ISP Remand Order. The FCC's helpful brief, while not taking a position on the outcome of this appeal, nonetheless **supports the conclusion that the order did not clearly preempt state regulation of intrastate access charges.**⁴ [Emphasis supplied.]

The 1st Circuit justices then considered and rejected Global's argument that even if the ISP Remand Order did not expressly preempt state authority, other FCC policies did so impliedly:

Global NAPs says that the access charges will "virtually eliminate competition in the non-broadband internet access market." In the face of the FCC's long-standing recognition of state authority over intrastate access charges, and in the absence of clear evidence that the access charges here would impede competition, this argument is insufficient to find implied preemption.⁵

It is true that the FCC's currently open IP-enabled services proceeding might result in rulemaking that preempts state authority over intrastate access charges. However, in the absence of an FCC request to states to forbear from exercising their authority to arbitrate interconnection agreements while that proceeding is pending, to arbitrate cases where the requirements for arbitration have been met.

In summary, Global has failed to show good cause why this arbitration should not go forward.

⁴ *Id.*, p. 12.

⁵ *Id.*

IT IS RULED that the motion of Global NAPs California, Inc. to dismiss or stay the instant proceeding is denied.

Dated July 6, 2006, at San Francisco, California.

/s/ KARL J. BEMESDERFER

Karl J. Bemederfer
Administrative Law Judge

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Dated July 6, 2006, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

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